

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



Original

16-2036

To be argued by  
LILLIAN Z. COHEN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
ROBERT RICKENBACKER, :  
Relator-Appellant, :  
-against- :  
THE WARDEN, AUBURN CORRECTIONAL :  
FACILITY, and THE PEOPLE OF THE :  
STATE OF NEW YORK, :  
Respondents-Appellees. :  
-----X

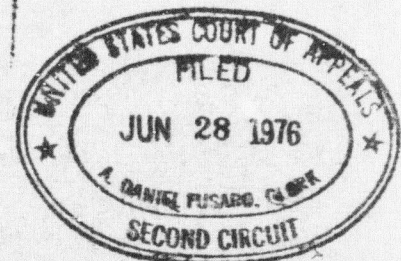
BRIEF FOR RESPONDENTS-APPELLEES

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p/s

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

ROBERT RICKENBACKER,	:	
Relator-Appellant,	:	
-against-	:	Docket No. 76-2036
THE WARDEN, AUBURN CORRECTIONAL	:	
FACILITY, and THE PEOPLE OF THE	:	
STATE OF NEW YORK,	:	
Respondents-Appellees.	:	

-----X

BRIEF FOR RESPONDENTS-APPELLEES

Question Presented

Did the District Court correctly hold that appellant was adequately represented at his trial where his attorney, an experienced criminal lawyer, was active in appellant's behalf throughout the trial and focused the jury's attention on appellant's defense, i.e., the unreliability of the eye-witnesses' identification?

### Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Platt, J.), dated February 24, 1976, which denied appellant's application for a writ of habeas corpus without a hearing. On April 6, 1976 this Court granted appellant's application for a certificate of probable cause.

### Facts

Appellant is presently confined in Auburn Correctional Facility, Auburn, New York.\* He is serving a sentence of 25 years to life imprisonment imposed upon him in Supreme Court, Kings County on January 20, 1972 following his conviction, after a jury trial, of the crime of murder.

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department (People v. Rickenbacker, 46 A D 2d 740 [2d Dept. 1974]) and leave to appeal to the New York Court of Appeals was denied on November 14, 1974 (Stevens, J.).

\* Appellant was confined in Auburn at the time his application was filed in the District Court. On April 30, 1975, he was transferred to Fishkill Diagnostic and Evaluation Center and on June 5, 1975 was transferred to Matteawan State Hospital. He was returned to Auburn on May 7, 1976.

Appellant and three other men were charged with felony murder and common law murder following a robbery during which one of the victims was shot and killed. Appellant's three accomplices, Zachary Morgan, David Ferguson and Curtis Austin, were apprehended as they attempted to flee from the scene of the crime. Appellant was arrested approximately nine months later.

The four men were tried together in May, 1971 in Supreme Court, Kings County (Barshay, J.). During trial Austin pleaded guilty to a lesser charge after admitting outside the hearing of the jury that he had waited in his car while his co-defendants went to commit the robbery which led to the charges against them (FT 736, 740).<sup>\*</sup> At the conclusion of the trial Morgan and Ferguson were convicted of murder. A mistrial was declared as to appellant when the jury could not reach a verdict.

Appellant's second trial took place in October, 1971. Sam Fichera, the owner of the grocery store which was robbed, testified that at about 6:30 p.m. on July 30, 1970, three men entered the store. He saw the faces of two of them, later identified as Morgan and Ferguson (44). While Morgan held

<sup>\*</sup> Numbers in parentheses preceded by the letters "FT" refer to the pages of the transcript of appellant's first trial. Unless otherwise indicated, all other numbers in parentheses refer to the pages of the transcript of the second trial.

a gun, Ferguson emptied the cash register. Also standing near the register at that point was Vito Petrancosta, Fichera's cousin. Apparently Petrancosta moved and this prompted Morgan to shoot him (45). The robbers ran from the store followed by Fichera who had seized a gun which he kept in the store. He fired two shots -- one into the air and one at the two men he saw running down the street (47).

Michael Petrancosta, the son of the deceased, was also in the store when his father was shot. He too saw three men in the store. He later recognized only Morgan and testified that it was Morgan who shot his father (49-51).

Patrolman Thomas Walsh testified that on July 30, 1970, at about 6:30 p.m. he was on radio car patrol on East 29th Street, Brooklyn near Albemarle Road when he heard pistol shots. He walked toward Albemarle Road and saw three young black men running toward a parked car occupied by one black youth. He was approximately 20 or 30 feet from the vehicle. Two of the men who were running -- Zachary Morgan and appellant -- were carrying guns. The third man was David Ferguson (55-57). As they approached the car, they faced him and he saw their faces as well as their entire bodies (58).

Morgan entered the car but Ferguson and appellant turned and ran back to Albemarle Road. Patrolman Walsh saw appellant -- who was then 30 or 40 feet away -- throw a gun between two parked cars (59). He then entered his patrol car and drove in pursuit of the two men. At one point he drove up parallel to them and again saw appellant's face, but traffic prevented him from catching them (60). Appellant looked back one more time before he and Ferguson ran into an A & P (61-62). Patrolman Walsh left his car and followed them through the market where he was able to see appellant's face another time (62). Ferguson and appellant ran through the store and into a parking lot, where they separated. Patrolman Walsh pursued Ferguson and apprehended him, but appellant escaped. Patrolman Walsh acknowledged that it was necessary for him to turn several corners while pursuing the two men and also that they were running fast. He estimated that the entire chase took approximately three or four minutes (65-66).

Patrolman Donald Scannapieco, a partner of Patrolman Walsh, testified that he also heard shots and saw the three men running. He was able to see their faces since they were running in his direction (67-70). Two of them -- Morgan and appellant -- were carrying guns. They attempted to enter a

parked car but only Morgan succeeded in getting in. The other two, appellant and Ferguson, turned toward him and then turned and ran the other way. At the time they turned toward him they were approximately 20 feet away and he could see their faces (72). While Patrolman Walsh chased the two men, he arrested Morgan and the man seated in the car (72).

Detective Robert Marshall testified that he was in charge of investigating the robbery and shooting which took place on July 30, 1970 (75). He spoke to the three men who had been arrested. At midnight of that date he proceeded to 63 Decatur Street in Brooklyn where he spoke to a man (78). Inside the premises, which was a rooming house, he conducted a room-to-room search but did not find appellant (79). Based on information he received he went to several other locations and spoke to people at each place but did not find appellant. During the next month he continued going to other locations. In addition, on approximately one dozen occasions he kept 63 Decatur Street under surveillance, mostly between 8:00 p.m. and midnight until 6:00 or 7:00 a.m. (116-117). He saw appellant for the first time on March 11, 1971 at the police station. In taking his pedigree, he asked appellant his name

and address and was told, Robert Rickenbacker, 63 Decatur Street (86).

At the conclusion of Marshall's testimony, defense counsel moved to strike out the parts of the testimony relating to the efforts to find appellant on the ground that no foundation had been laid for it and, therefore, it could not be relied upon to show flight (88, 91-92). Counsel also moved to strike the statement relating to the taking of appellant's pedigree on the ground that no Miranda warnings had been given (89). Both requests were denied.

After testimony by the medical examiner the People rested. The defense presented no witnesses.

In summing up to the jury, defense counsel pointed out that neither of the witnesses who were presented in the store was able to identify appellant (162, 167). He then attempted to undermine the testimony of the police officers who stated they had seen appellant running from the scene by suggesting that the men were running fast at the time, that Patrolman Walsh lost sight of appellant several times because the chase went around several corners and that the

entire chase lasted only three or four minutes (163-165). He also noted that the prosecution had not introduced any fingerprint evidence with respect to the gun which appellant had discarded (168).

The summation by the Assistant District Attorney emphasized the fact that two policemen had seen appellant run from the scene of the crime together with two men (176-177), later identified by the victim as having committed the crime. He also argued that for a period of nine months police efforts to find appellant were unsuccessful and that this indicated flight (179).

During its deliberations the jury asked to have the reporter read the testimony of the store owner and the son of the deceased as well as that of the two officers who saw appellant running from the scene of the crime. After this was done the jury continued its deliberations and returned a guilty verdict.

### Proceeding in the District Court

In his application for federal habeas corpus relief appellant attacked his conviction on five grounds: (1) he was inadequately represented at trial by his assigned attorney; (2) his Sixth Amendment rights were violated when a prosecution witness "conveyed to the jury the inference that several of appellant's cohorts had implicated him and had disclosed his alleged residence" (Pet. p. 3); (3) information obtained during post-arrest "interrogation" was admitted at trial in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (4) the prosecution did not present proof which would permit an inference that appellant had fled after the crime and attempted to conceal himself; (5) the trial judge was not an "impartial arbiter" and, therefore, effectively assisted the prosecution's case. The application was denied on February 24, 1976.

The District Court refused to consider claim #5 because appellant had never presented it to the state courts and therefore had not satisfied the requirements of 28 U.S.C. § 2254. The remaining claims were rejected on the merits.\*

\* Since appellant has apparently abandoned all of the claims considered below except the first one relating to the adequacy of his trial lawyer's representation, appellees' discussion of the opinion below is confined to that issue.

In rejecting appellant's contention that his trial attorney had inadequately represented him the District Court concluded that appellant's attorney

"did not fail to 'present the cause of the accused', or, perform so 'ineptly as to give rise to a valid claim of inadequate assistance under the strict standard laid down in United States v. Wight [176 F. 2d 376 (2d Cir. 1949)]'."

The Court examined each of counsel's alleged omissions and found that appellant "simply differ[ed] with defense counsel's strategy". This difference of opinion did not entitle appellant to relief.

In particular, the Court held that the question of how extensively the witnesses should have been cross-examined was a judgment to be made by counsel.

"As has been pointed out many times before, the advisability of extensive cross-examination is a matter open to honest differences of opinion."

In the instant case counsel was able to make his judgment after reviewing the witnesses' testimony at the first trial.

The Court held that, in any event, even if more questions might have been asked, appellant was not harmed since counsel's summation to the jury emphasized "the inherent unreliability of eye-witness identifications."

The Court also rejected appellant's contention that counsel improperly failed to object to the introduction in evidence of the gun discarded by appellant as he fled. In light of the police officer's testimony that he saw appellant discard the gun and retrieved it minutes after appellant escaped, "experienced counsel may well have determined that an objection would have been futile".

Finally the Court held insignificant counsel's failure to object to so much of the district attorney's opening statement as promised to introduce the testimony of appellant's relatives and friends on the issue of flight. The Court pointed out that counsel had gone one step further and moved to strike the entire testimony of the police officer who testified that appellant could not be found for nine months after the crime.

Based on its review of the record, the Court concluded that "(t)his case is a long way from approaching the standard for ineffective assistance of counsel" applied by the decisions in this Circuit.

### ARGUMENT

THE DECISION OF THE DISTRICT COURT  
THAT APPELLANT WAS ADEQUATELY  
REPRESENTED BY HIS TRIAL ATTORNEY  
IS SUPPORTED BY THE RECORD AND  
SHOULD BE AFFIRMED.

Appellant claims, as he did in the District Court, that he was deprived of a fair trial because the defense accorded him by his attorney was a farce and mockery (App. Br. p. 24). The trial record demonstrates, however, that counsel's efforts in appellant's behalf were well within the constitutional limits set by this Circuit and the District Court correctly so held.

The standards for establishing inadequacy of counsel in this Circuit are well-established:

"Errorless counsel is not required...[B]efore we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'"

United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963) (emphasis supplied). See also United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 109 (2d Cir. 1970), cert. den. 402 U.S. 909 (1971); United States v. Wight, 176 F. 2d 376, 379 (2d Cir. 1949), cert. den. 338 U.S. 950 (1950). The fact

that "the case could have been better tried" is not a reason to sustain such a claim. United States v. Katz, 425 F. 2d 928, 931 (2d Cir. 1970).

The flaw in relator's claim is that, in essence, he simply differs with the way the defense should have been conducted. Thus, he does not claim that counsel failed to present an available substantial affirmative defense (United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36 [2d Cir. 1972]) or that counsel failed to prepare sufficiently. (See United States ex rel. Testamark v. Vincent, 496 F. 2d 641 [2d Cir. 1974]).\* On the contrary, he simply points to certain alleged omissions of counsel which he maintains amounted to ineffective

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\* Counsel for appellant, in a display of hindsight, intimates for the first time that counsel might have explored an insanity defense based on appellant's "history of mental illness" and notes that appellant was transferred to Matteawan State Hospital "within months of his sentencing" (App. Br. p. 32). In fact, appellant was transferred to Matteawan more than three years after sentence. Furthermore, there is nothing in the record of either trial to indicate that appellant was incompetent or that he had a viable defense of insanity. Instead, the record indicates that appellant was able to consult not just with one attorney, but with two. Neither saw any basis to interpose the defense which appellant's current attorney now advances.

assistance.\* However, as this Court said in United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 133, n. 4 (2d Cir. 1967):

"[A] defendant's constitutional right to fundamental fairness is not violated when, looking back upon the events occurring at a trial, one can perceive ways in which the trial representation could have been bettered and some errors or mistakes avoided. Fundamental fairness is denied only in extreme situations and then only when the defendant is obviously prejudiced thereby." (Emphasis added).

Appellees submit that the alleged omissions relied upon by appellant do not constitute incompetence and, in any event, did not obviously prejudice appellant's rights.

\* At p. 24 of appellant's brief his attorney limits the attack on trial counsel's performance to matters of record since appellant is presently insane and unable to confer. Appellees note that on May 7, 1976 appellant was returned to Auburn Correctional Facility because he has regained his sanity. More important is the fact that at the time of his state court appeal appellant was not confined in Matteawan and therefore apparently was not then insane. Nevertheless there was no suggestion at that time that trial counsel committed any errors dehors the record, let alone any allegation that counsel may have made "egregious misrepresentations" to appellant. (App. Br. p. 24). We must therefore assume that the only actions open to challenge are those which appear in the transcript.

For example appellant maintains that counsel was delinquent because he did not closely cross-examine the prosecution witnesses, particularly the police officers who identified him at trial. Indeed, he posits a series of questions which counsel might have asked on cross-examination. As a practical matter however, the question of what and how much to ask the witnesses was a judgment to be made by counsel based upon the facts known to him which, in this case, included access to the witnesses' testimony at appellant's first trial, as well as at the Wade hearing which preceded it.

The transcript of the first trial discloses that the officers who identified appellant as one of the men fleeing from the scene of the crime did not falter in their testimony to this effect despite extensive cross-examination by the attorneys representing the four defendants at the trial. As the District Court correctly pointed out, counsel could well have concluded that extensive cross-examination of these witnesses might simply reinforce their testimony on direct examination. See Finer, "Ineffective Assistance of Counsel", 58 Cornell Law Review 1077, 1097 (1973).

Appellant suggests that if counsel had properly cross-examined the two victims earlier in the trial he might have asked the officers to describe the clothing worn by appellant. In fact, however, although both victims testified that three men were involved in the robbery, neither focused his attention on the third man and neither could identify him. Therefore, it was unlikely that either could have described how he was dressed. Furthermore, it is difficult to see how counsel can be faulted for not pursuing this line of questioning when the four attorneys at the first trial did not see fit to actively pursue it either.\*

Appellant also claims that the officers should have been cross-examined with respect to their identification of the weapon discarded by appellant as he fled. However, there would have been little point to this in light of Officer Walsh's testimony on direct that he saw the gun discarded and, minutes later, readily retrieved it.

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\* Very few questions were asked at the first trial about the clothing worn by the robbers. Most of them related to whether Morgan wore a hat during the robbery.

Moreover, there was a substantial reason for counsel to refrain from drawing attention to the discarded gun, i.e., its distinctive appearance. Thus at the first trial both officer Walsh and Fichera were able to describe the gun as being large, silver in color and "old-fashioned" (FT 353, 532, 538). At the second trial the District Attorney neglected to elicit this testimony. If counsel had made an issue of the circumstances under which Walsh retrieved the gun, this might have prompted the District Attorney to fill the gap which he had left. Given the fact that the gun was introduced into evidence and seen by the jury it would have been far more damaging for the jury to hear that Walsh saw appellant running with an old, silver-colored gun in his hand rather than just hearing that he was carrying a gun.\*

It is true that counsel did not ask Walsh why the gun was not checked for fingerprints. However, the value of such a question is doubtful since Walsh specifically testified

\* Appellant faults counsel for not objecting to the introduction of the gun. It is significant in this regard that no such objection was made by any of the attorneys at the first trial (FT 540). In any event, as the District Court pointed out, "it is doubtful that any objection made by counsel would have succeeded" in light of the officers' testimony that appellant was carrying the gun, and Walsh's testimony that he was 30 to 40 feet away when the gun was discarded and retrieved it soon after.

that he saw the gun in appellant hand.\* In any event, as appellant concedes, the point was not neglected since counsel did argue it to the jury in summation.

Appellant also maintains that counsel should have cross-examined the two eye-witnesses, Fichera and Michael Petrancosta, more actively.\*\* He concedes, however, that neither witness identified him as one of the men in the store.\*\*\* As with the police officers, he posits questions which might have been asked. The fact that none of them would have been helpful is demonstrated by the testimony of the witnesses at the first trial. Indeed, appellant's case would have been injured if, as is now suggested, counsel attempted to emphasize "that only one of the robbers, Morgan, was armed" (App. Br. p. 26) since Fichera specifically testified at the first trial that he saw two guns in the store (FT 353, 356). Trial counsel, who had read the minutes of the first trial, properly refrained from asking how many guns Fichera saw

\* Appellant's suggestion that someone "might have come along and substituted" another gun is ludicrous, especially in the case of a gun as distinctive as the one here involved (App. Br. p. 30).

\*\* At appellant's first trial the attorney who represented him did not cross-examine either Fichera or Petrancosta (FT 409, 504A).

\*\*\*Appellant erroneously states that Michael Petrancosta was able to identify both Morgan and Ferguson (App. Br. p. 27). Petrancosta's testimony at both trials is that he recognized only Morgan.

because (a) the answer would have corroborated the officers' testimony that two men were carrying guns as they ran from the scene of the crime and (b) Fichera might have described the gun as he did at the first trial.

Finally, appellant alleges that counsel failed to cross-examine Detective Marshall properly, particularly with respect to the basis for his attempt to find appellant after the crime. In appellant's view, questions along this line would have elicited testimony establishing a Bruton claim. This argument is based on the fact that the District Court rejected appellant's Bruton claim because there was "no testimony that any co-defendant had implicated [appellant]". Query, however, whether it is proper for counsel to elicit an answer which may prejudice his client before the jury just so that he may create errors in the record. The proper procedure is to object to the witness' testimony.\*

As further evidence of counsel's incompetence appellant cites the fact that counsel made no opening statement and failed to object to certain factual misstatements made by the court in its charge to the jury. He also attacks

\* In the instant case counsel did not object to Detective Marshall's testimony on Bruton grounds. However such an objection would have been unavailing since there was no Bruton violation. Significantly, appellant has not raised the Bruton claim in this Court and, therefore, apparently concurs in the District Court's determination of this issue.

the effectiveness of counsel's summation. None of these alleged errors was cited to the court below either in the petition or in appellant's memorandum of law and appellant's reference to them in this Court illustrates the wisdom of the rule prohibiting evaluation of counsel's performance on the basis of hindsight.\*

The decision whether or not to make an opening statement is a tactical determination which depends upon the nature of the particular case. In the instant case appellant did not have an affirmative defense to present to the jury which counsel might have outlined. Rather, his defense consisted of attempting to undermine the officers' identification testimony. In these circumstances counsel may well have decided that he would not make any promises to the

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\* Appellant's attorney on the direct appeal did cite counsel's failure to object to the trial court's statements that there was testimony that two guns were seen in the store. Although counsel did not object to these misstatements the significance of this omission is mitigated by (a) the court's statement to the jury that their recollection of the facts was controlling and not that of the court or that of counsel (225) and (b) the fact that the jury asked to hear the testimony of the eye-witnesses during its deliberations and, therefore, was able to decide on the basis of what was actually said by the witnesses (238).

jury with respect to the evidence that he could not be sure of keeping.\* In any event, as one commentator has noted,

"...it is difficult to imagine a case in which the absence of an opening statement could be deemed prejudicial to the defendant, even applying the constitutional harmless error test."

Finer, "Ineffective Assistance of Counsel", 58 Cornell Law Review 1077, 1094 (1973).

Appellant's attack on counsel's summation is undoubtedly prompted by the District Court's determination that even if the cross-examination might have been more extensive this "did not result in a failure to put before the jury the inherent unreliability of eye-witness identification". One has only to read the summation to see that appellant's belated challenge is wholly without merit.

Defense counsel devoted most of his summation to challenging the identification testimony against appellant. Counsel first stressed the fact that the witnesses who had been present in the store at the time of the crime could not identify appellant (162, 167). He then attacked the testimony of the two police officers who stated that they saw appellant run from the scene of the crime with a gun

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\* At appellant's first trial all four attorneys waived opening statements in behalf of their clients (FT 331).

in his hand. He pointed out that the entire chase was very brief, that because the men were running fast their faces must have been contorted (163-64), that Officer Walsh had acknowledged that he lost sight of appellant several times when he turned corners, that Officer Scannapieco just "got one look" (165), and that there was a lapse of time between the initial observation of appellant and the in-court identification (164). Counsel also pointed out that there had been no proof that appellant had been in the store or that appellant had any distinguishing characteristic by which the officers might have identified him (167). Finally, counsel referred to the absence of any fingerprint evidence which would link appellant to the gun (168).

Apparently, the summation had an impact on the jury because during their deliberations they asked to hear the testimony of the two victims and the testimony of Officers Walsh and Scannapieco (238). The record thus demonstrates that counsel's summation was adequate.\* Contrast United States v. Hammonds, 425 F. 2d 527 (D.C. Cir. 1970) where defense counsel, in his summation, said absolutely nothing in behalf of his client.

\* Appellant, in attacking the summation suggests that statements made by counsel indicate that he was indifferent and even biased against his client. This is a new allegation which was not raised in the state courts let alone in the court below. Therefore, it should not be considered by this Court because of appellant's failure to satisfy the exhaustion requirement of 28 U.S.C. § 2254.

The trial record as a whole shows that defense counsel was active in appellant's behalf. The fact that he conducted the defense differently from the way appellant's present attorney would have conducted it is not a basis to set aside an otherwise valid judgment of conviction. As the court below properly concluded, "[t]his case is a long way from approaching the standard for ineffective assistance of counsel" applied by this Court.

Although appellant claims that he has met this Court's standard, he obviously recognizes the weakness of his argument since he urges this Court to change the standard by which it evaluates the adequacy of counsel's representation. He cites various standards which have been adopted by other Circuit Courts but does not compare their relative merits. Apparently, in his view, any of the cited standards is preferable to the existing one. The short answer to appellant's argument is that counsel's performance easily meets those less stringent standards as well.

For example, this is hardly a case in which "gross incompetence blotted out the essence of a substantial defense" (Bruce v. United States, 379 F. 2d 113 [D.C. Cir. 1967]). On

the contrary, the record shows, and the District Court found, that counsel did not fail to put before the jury the identification issue which was appellant's "defense". Similarly, the record in this case satisfies the "customary level of skill and knowledge" standard. Moore v. United States, 432 F. 2d 730, 736 (3d Cir. 1970) (in banc). Although another lawyer might have made an opening statement to the jury or used cross-examination rather than summation as a device for attacking the identification, many reasonably competent criminal lawyers would concur in the approach adopted by appellant's attorney. So long as his decisions are at least open to debate, counsel's performance may not be found constitutionally lacking. Finer, supra at 1080. Contrast Moore v. United States, supra (cross-examination failed to utilize impeachment information as to witness' earlier failure to identify the defendant).

In view of the fact that counsel's performance was constitutionally adequate under any of the standards proposed by appellant, this Court need not reach the issue of whether its existing, well-established standard should be modified.

CONCLUSION

THE DECISION OF THE DISTRICT  
COURT SHOULD BE AFFIRMED.

Dated: New York, New York  
June 25, 1976

Respectfully submitted,

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STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

MAGDALINE SWEENEY , being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Respondents-Appellees herein. On the 25th day of June , 1976 , s he served the annexed upon the following named person :

AARON J. JAFFE  
Attorney for Appellant  
401 Broadway  
New York, New York 10013

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Magdaline Sweeney

Sworn to before me this  
25th day of June , 1976

Lillian J. Cole  
Assistant Attorney General  
of the State of New York